OH CHENG LIM

v.

LIM EAM WOOI

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL APPEAL NO. 33 OF 1982]
7 JANUARY 1988

LANDLORD AND TENANT: *Control of Rent Act 1966 - Member of family - Order for vacant possession - Bona fide - Greater hardship - Other accommodation - Alternative accommodation - Comparative hardship - Balance of hardship.*

CIVIL PROCEDURE: *Onus of Proof - Landlord and tenant - Misdirection by learned Magistrate - Whether Appellate Court can interfere on question of greater hardship.*

The plaintiff/respondent is the owner of the neighbouring premises known as 119, Jalan Batu Lanchang (the neighbouring premises), a two-bedroomed house which she occupies with her two sons, their wives and children, a total of twelve occupants; the space available was totally inadequate with the result that she and two of her grandchildren have to sleep either in the hall downstairs or outside the bedroom, whilst the rest would sleep in the two bedrooms. The plaintiff/respondent sought for and eventually obtained possession of the controlled premises known as 117-C, Jalan Batu Lanchang, Penang (the premises), which she owned from the defendant/appellant (tenant) as the premises were reasonably required by her and her children as a residence in accordance with the provisions of ss. 16(1)(f) of the Control of Rent Act 1966 ('the Act').

This was a tenants appeal arising out of an order for vacant possession of the premises in favour of the landlord. The defendant/appellant appealed on the grounds that:

(a) it was not proved that the plaintiff reasonably required the premises for occupation by herself or any member of her family within the meaning of the Act;

(b) the question of greater hardship should have been decided in favour of the defendant, and

(c) the plaintiff had not discharged the onus of proving that other accommodation was available to the defendant.

Held:

[1] The first ground of appeal failed because this was a new point which was taken for the first time nor was it taken in the memorandum of Appeal, therefore it is not open to the appellant to take the point and there was evidence to support the conclusion of the learned Magistrate regarding this part of the case.

[2] On grounds (b) and (c) the learned Magistrate had misdirected herself:

(a) she did not address her mind to the question as regards the onus of proof in relation to the issue of availability of other accommodation to the tenant or the landlord.

(b) she failed to recognise that the plaintiff had not discharged the onus of proving that other accommodation was available to the defendant.

(c) in considering the question of comparative hardship she categorically disregarded the hardship which would be occasioned to the sister or the brother of the defendant by the grant of an order for vacant possession in breach of explicit authority enjoining her to do so;

(d) she failed to take into account or give proper weight to the financial means of the defendant when considering the question of availability of other accommodation to the defendant. Nor did she recognise that on the evidence the plaintiff's financial position appeared to be superior to that of the defendant.

[3] In considering the issue of greater hardship the appellate Court cannot upset the decision of the trial Court simply because it might have come to a different conclusion itself but in exceptional cases an appellate Court will interfere on the question hardship, as in this case when the trial Court had proceeded on a mistaken basis of the law, or has misdirected itself on the facts or the evidence, or by making findings which are based upon false premise.

[4] Appeal must be allowed and the possession order set aside.

[5] The onus of proving that other accommodation is available to the tenant is on the landlord but the onus of proving that other accommodation is available to the landlord is on the tenant.

[6] Plaintiff will have to pay to the defendant the costs of the proceedings and order for refund of the deposit paid by the defendant.

Cases referred to:

The Perak Hauliers Ltd. v. The Cycle & Carriage Co. Ltd. [1962] 28 MLJ 7
Gan Heng Soo v. Lee Lyong Tai [1952] MLJ 161
Aitken v. Shaw [1933] SLT (Sh Ct) 21
Sims v. Wilson [1946] 2 All ER 261
Gould v. Annely [1939] LJN CCR 343
Sharma v. Sinnama [1961] MLJ 325
Chandler v. Strevett [1947] 1 All ER 164
Coplans v. King [1947] 2 All ER 393
T.A.M. Abdul Aziz & Co. v. Shamsudeen Mohamed John [1951] 17 MLJ 141
Smith v. Penny [1947] 1 KB 230
Read v. Goater & Anor. [1921] 1 KB 611
Epsom Grand Stand Association Ltd. v. Clark [1919] 35 TLR 525
Harte v. Frampton [1948] 1 KB 73
Veeriah v. Mal Singh [1969] 2 MLJ 93
MacFarlane v. Murray Lyon [1927] SLT (Sh Ct) 79
Alexander v. Mohamadzadeh [1985] 276 EG
Williamson v. Pallant [1924] 2 KB 173
Shrimpton v. Rabits [1924] 131 LT 478
King v. Taylor [1955] 1 KB 150
Manaton v. Edwards & Anor. [1985] 276 EG
Piper v. Harvey [1955] 1 QB 439
Ponnudurai v. Jayatilake [1965] 1 MLJ 131

Legislation referred to:

Control of Rent Act 1966, s. 16(1)(f), (n)
Evidence Act 1950, s. 114
Rent and Mortgage Interest Restrictions (Amendment) Act 1933 [UK], s. 3(h)

For the appellant - Balasundram
For the respondent - Lim Ewe Hock (David Khaw with him)

JUDGMENT

Edgar Joseph Jr J:

This was a tenant's appeal arising out of an order for vacant possession of controlled premises known as 117-C, Jalan Batu Lanchang, Penang ("the premises") made by the learned Magistrate, Georgetown, in favour of the landlord, the respondent herein.

For the sake of convenience, I shall refer to the appellant and the respondent as the defendant and the plaintiff respectively.

According to the pleadings, the evidence and the submissions of Counsel in the Court below, the ground upon which the plaintiff sought for and eventually obtained possession was that the premises were reasonably required by her and her children as a residence in accordance with the provisions of s. 16(1)(f) of the Control of Rent Act 1966 ("the Act"). So far as material to the particular circumstances of this case, the provisions of that sub-section read as follows:

> 16. (1) ...; and no order or judgment for the recovery or possession of any controlled premises or any part thereof comprised in a tenancy shall be made or given by the Court except in any of the following cases-
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> (e) ...
>
> (f) where the owner of the controlled premises reasonably requires the same for occupation by himself or any member of his family or any person for whom he holds the premises in trust, and -
>
> (i) ...
>
> (ii) the tenancy has been determined by not less than one year's notice to quit and there has been no change by purchase in the ownership of the premises within one year next preceding the date of such notice:
>
> Provided that an order or judgment shall not be made or given on any ground specified in this paragraph if the Court is satisfied that, having regard to all the circumstances of the case, including the question whether other accommodation is available for the owner or the tenant, greater hardship would be caused by granting an order or judgment than by refusing to grant it:

The case for the plaintiff is that although she is also the owner of the neighbouring premises known as 119, Jalan Batu Lanchang ("the neighbouring premises"), a two bedroomed house, which she occupies with her two sons, their wives and children, a total of twelve occupants, the space available was totally inadequate with the result that she and two of her grandchildren have to sleep either in the hall downstairs or outside the bedrooms, whilst the rest would sleep in the two bedrooms.

On the other hand, the case for the defendant was that the plaintiff's reliance upon the provisions of s. 16(1)(f) of the Act was not *bona fide*; in particular, it was contended that the plaintiff did not reasonably require the premises for occupation by herself or any member of her family because she already had a residence at the neighbouring premises aforesaid

whereat she had been residing for many years and still is residing with her two sons, their wives and the grandchildren. The defendant went further and alleged that the true reason for the plaintiff seeking possession was because she had failed to obtain his agreement to an increase in rent from RM15 p.m. to RM40 p.m.

The defendant went further and contended that greater hardship would be caused by granting an order for possession than by refusing it. In particular, the defendant says that he stays in the premises - a one bed-roomed house - with his sister, now 50 years of age, unemployed and an invalid spinster and his brother whose work as a printing press employee often takes him outstation. The defendant is himself a self-employed welder with a net income in the region of RM200 per month. In such circumstances, the defendant claims that it is difficult for him to find other accommodation for himself, his sister and his brother. Nor, for that matter, does he have any other accommodation to which he could turn as the accommodation allegedly owned by him is in fact his brother-in-laws. Finally, the defendant claims that he will not be able to afford to rent other accommodation on his meagre income as the rents charged elsewhere are very high.

I would pause, at this stage, to observe that for purposes of the first proviso to s. 16(1)(f) of the Act, the expression "other accommodation" need only be adequate accommodation, that is to say, accommodation containing space adequate for the purposes for which it is required by the tenant, as opposed to the expression "alternative accommodation" in para. (n) of s. 16(1) which reflects some measure of quality or amenities in addition to a purely quantitative measure (per Good J.A. in *The Perak Hauliers Ltd. v. The Cycle and Carriage Co. Ltd.* [1962] 28 MLJ 7, 9).

Upon the evidence aforesaid, the learned Magistrate found as a fact (1) that the plaintiff "had satisfied the Court that she reasonably requires the premises for herself and her children"; (2) that the defendant has not discharged his burden "on the further question of greater comparative hardship", and (3) that "the defendant has not proved actual difficulty in finding alternative accommodation". She also found, as a matter of law, that in so far as alternative accommodation or hardship is concerned, the Court is not required to take into consideration the problems that would be faced by the brother or the sister (of the defendant) as they do not come within the definition of "member of the family" as given in the Act relying on *Gan Heng Soo v. Lee Lyong Tai* [1952] MLJ 161. In the result, the learned Magistrate made the possession order from which the defendant now appeals.

Before me, the judgment of the learned Magistrate has been attacked, principally, on the following grounds:

(a) that it was not proved that the plaintiff reasonably required the premises for occupation by herself or any member of her family within the meaning of the Act.

(b) that upon the evidence, the question of greater hardship should have been decided in favour of the defendant and

(c) that the plaintiff had not discharged the onus of proving that other accommodation was available to the defendant.

It is trite law that a landlord may override a tenant's protection under the Act if he proves that he reasonably requires the accommodation for his own use or for any member of his family or for any person for whom he holds the accommodation in trust, but this exception is subject to two provisos; only the first being relevant to the present case, namely, that the Court must be satisfied that the tenant will not suffer greater hardship. In this situation, the

burden of proof is on the landlord to prove "a genuine present need" for the accommodation "and not be moved by considerations of preference and convenience merely". (See *Aitken v. Shaw* [1933] SLT (Sh Ct) 21) and the tenant then has the burden of proof that he would suffer greater hardship: (*Sims v. Wilson* [1946] 2 All ER 261). So, if the Court is left in doubt as to where the greater hardship lies, the landlord's claim will succeed: *Gould v. Annely* [1939] LJNCCR 343. But, it should not be overlooked that the Court is required under the provisions of the proviso to have regard to "all the circumstances of the case" including the question whether "other accommodation is available for the owner or the tenant". It would seem, therefore, that while the onus is on the tenant to show that other accommodation is available to the landlord, it is for the landlord to show that other accommodation is available to the tenant. Support for this view may be derived from the following two authorities:

In *Perak Hauliers Ltd. v. The Cycle and Carriage Co. Ltd. (ibid)*, Good J.A. said at p. 9 column 1 F:

> ... the onus of proving that other accommodation is available for the tenant is upon the landlord: *Nevile v. Hardy* [1921] 1 Ch. 404.

In *Sharma v. Sinnama* [1961] MLJ 325, Hepworth J said at p. 326 column 2 C, D

> The landlord said that she had taken no steps to find alternative accommodation... But if there was other accommodation which was suitable to the respondent (the landlord) it was for the tenant to lead evidence to that effect and not the landlord.

However, although the question of "other accommodation" is normally the most important of the circumstances to be considered (*Chandler v. Strevett* [1947] 1 All ER 164, 168 C.A.) there is no rule that an order for possession cannot be made unless other accommodation protected by the Act is available to the tenant: *Sims v. Wilson (ibid)*. To the same effect was what Hepworth J said in *Sharma v. Sinnama (ibid)* at p. 426 column 2 H namely:

> the availability of other accommodation is an important consideration but it is not the only consideration. All the circumstances on both sides must be taken into accounts.

It is with the above principles in mind that I turn to examine the grounds of appeal, not overlooking the fundamental proposition that where there is evidence on which the finding of the learned Magistrate can be supported a higher Court will not disturb that finding: *Coplans v. King* [1947] 2 All ER 393, *T.A.M. Abdul Aziz & Co. v. Shamsudeen Mohamed John* [1951] 17 MLJ 141.

Now, as regards ground (a) namely, that it was not proved that the plaintiff reasonably required the premises for occupation by herself or any member of her family; it was contended before me that the grandchildren and daughters-in-law of the plaintiff who resided with her in the neighbouring premises were not persons who came within the ambit and meaning of the phrase "any member of his family" in s. 16(1)(f) of the Act which defines "member of family" to mean -

(i) the husband or widower; or

(ii) the wife or widow; or

(iii) the father or mother; or

(iv) the son or daughter.

This was a new point which was taken before me for the first time no mention having been made of it in the Court below. Nor, for that matter, was it taken in the memorandum of appeal.

It is my opinion, therefore, that it is not open to the appellant to take the point before me. Nevertheless, as the point was argued before me, I think it desirable for me to express my views thereon.

In *Smith v. Penny* [1947] 1 K.B. 230, the plaintiff who was the tenant and manager of a hotel, under an agreement, which bound him to reside therein, was permanently separated from his wife, had two children, aged ten and fourteen years and was anxious that they should live in a nearby house which he had purchased, as being a more suitable residence for them than the hotel. However, he had let the house to the defendant who refused to vacate it. The plaintiff had arranged with a Mr. and Mrs. Caley, who were friends of his, that they should occupy the house and that Mr. Caley should act as housekeeper and look after the two children.

In these circumstances, the plaintiff commenced proceedings in the County Court under s. 3 para. (h) of Schedule to the Rent and Mortgage Interest Restrictions (Amendment) Act 1933 (which is generally in *pari materia* with s. 16(1) of the Act) for possession of the house on the ground that he required it "for occupation as a residence for himself" within the meaning of para. (h).

The County Court Judge said that the words "occupation as a residence for himself" were satisfied as the house was to be used as a family home, whether the landlord was compelled by the exigencies of his business to live else where or not, and being of opinion that the other conditions of para. (h), including that of relative hardship, were satisfied in the plaintiff's favour, he gave judgment for possession.

On appeal, it was argued by Counsel for the defendant that the County Court Judge was wrong in holding that in making provision for a residence for his children, the dwelling house was reasonably required by the plaintiff "for occupation by himself" within the meaning of para. (h) of Schedule I to the Act of 1933. It was contended that the plaintiff already had a residence in the hotel where he had expressed the intention to reside and where he was bound by the terms of the agreement to do so; and there was ample accommodation there for his family. He could not, therefore, be said to reasonably require another house for occupation "for himself". The words "for himself" must be strictly construed because the paragraph specifically deals with the case of a son and daughter over 18 years of age and with the father and mother of the landlord. Accordingly, "himself" must refer to the landlord personally and not his family.

Scott LJ disposed of the submissions of Counsel for the tenant in the following terms:

> It was contended below, as it has been before us, that the words "for himself" must be strictly interpreted as meaning occupation for residence by the landlord personally, and cannot be interpreted as covering the case of his wanting the house as a family home, whether he lives in it himself, or whether being, for instance, obliged for the sake of earning his income to live elsewhere, he cannot live in it. I think the latter is the right interpretation ... The family is the unit of our civilization. To keep the family together is of high public importance. Had there been no separation and the mother had been available, what I have been saying would have been directly in point. If, unfortunately, a separation takes place between husband and wife, this Court ought to assume that it is a separation which is proper and unavoidable ... I, therefore, deal with the question here as if the person available to look after the two young children had been the plaintiff's wife. What the plaintiff did was to arrange with a friend of his, a Mr. Caley, that he and Mrs. Caley should live in the house and she should be paid as a housekeeper to look after the children... She gave evidence before the Court and

> the Judge saw her and, I think, was satisfied that the plaintiff was proposing to make proper arrangements for the welfare of the family. That disposes of the main question in the case as I see it...

The appeal was accordingly dismissed.

Clearly, therefore, the Court of Appeal in *Smith v. Penny (ibid)* construed the words of the statute "for occupation as a residence for himself" not strictly, as meaning for residence for the landlord personally, but liberally, so that an order could be made in favour of a landlord, who, being compelled by his work to live elsewhere, requires the house not for himself personally but as a family home for his two young children who, be it noted, were below the age of 18 years (and so outside the categories of persons who qualify for consideration under the statute of 1933) and their housekeeper. This was giving the words of the statute "for himself" an extended meaning because, to use the words of Scott LJ:

> The family is the unit of our civilization. To keep the family together is of high public importance.

I should think that in an Asian society, such as ours, these observations would apply *a fortiori*.

Accordingly, applying the principles enunciated by Scott LJ I, too, would construe the words "for occupation by himself" in a broad, practical common sense manner (per Cordie J in *Read v. Goater & Anor* [1921] 1 KB 611) so as to include, having regard to the particular circumstances of this case, the grandchildren and the wives of the two sons, all of whom have been residing with the plaintiff in the neighbouring premises as a single family unit for many years prior to the institution of proceedings.

I would, therefore, reject the submission by Counsel for the defendant that because "grandchildren and daughters-in-law" do not come within the definition of "members of family" under the Act, no order for possession could have been made in favour of the plaintiff.

It was further argued by Counsel for the defendant that it was not proved that the plaintiff reasonably required the premises for her own use or for her sons, their wives and the grandchildren because the plaintiff owned the neighbouring premises in which they had all resided and were residing. In other words, the *bona fides* of the plaintiff's claim was being impugned.

It is true that a landlord who invokes the aid of s. 16(1)(f) of the Act undertakes the burden of showing not only that he is acting *bona fides*, but also that he is acting reasonably in requiring possession: *Epsom Grand Stand Association Ltd. v. Clark* [1919] 35 TLR 525.

However, this point was taken before the learned Magistrate who saw and heard the plaintiff, the defendant and their respective witnesses testify and she decided it in favour of the plaintiff. I am of the opinion that there was evidence to support the conclusion of the learned Magistrate regarding this part of the case and so this ground of appeal also fails: *Coplans v. King (ibid) and T.A.M. Abdul Aziz & Co. v. Shamsudeen Mohamed John (ibid).*

I must next consider grounds (b) and (c) together, namely, that upon the evidence, the question of greater hardship should have been decided in favour of the defendant and that the plaintiff had not discharged the onus of proving that other accommodation was available to the defendant.

It was conceded by Counsel for the plaintiff - in my view rightly - that the learned Magistrate had misdirected herself when she held, as she did in fact hold, that

> "Insofar as alternative accommodation or hardship was concerned, the Court is not required to take into consideration the problems that would be faced by the brother or the sister (of the defendant) as they do not come within the definition of "member of the family" as given in the Act (*Gan Heng Soo v. Lee Nyong Tai* [1952] MLJ 161). This means that only the defendant's case need be considered."

In considering the question of comparative hardship, the learned Magistrate was bound to consider not merely the position of the landlord and the tenant but

> "hardship to all who may be affected by the grant or refusal of an order for possession - relatives, dependants, lodgers, guests and the stranger within the gates - but should weigh such hardship with due regard to the status of the person affected and their 'proximity' to the tenant or landlord and the extent to which, consequently, hardship to them would be hardship to him... The extrusion of a loved and trusted relation, whether dependent or not, would weigh heavily in the scales" (per Asquith LJ in *Harte v. Frampton* [1948] 1 KB 73, 79 applied in *Veeriah v. Mal Singh* [1969] 2 MLJ 93, 96).

It is obvious from her judgment that the learned Magistrate had erred in disregarding the position of at least the defendant's invalid spinster sister but not so much the brother for he did not require the premises for continuous occupation since his work often took him outstation. Nevertheless, it was not suggested that the brother stayed at the premises merely as a matter of taste or preference and not necessity: (See *Macfarlane v. Murray Lyon* 1927 SLT (Sh Ct) 79) and so, strictly speaking, the Magistrate ought to have given some consideration to his position as well.

However, I do not consider the refusal of the learned Magistrate to consider the position of the brother, an error of any consequence since I feel sure that he could have found other accommodation for himself had the necessity arisen.

Counsel for the plaintiff also conceded before me - again in my view rightly - that the learned Magistrate did not address her mind to the question who had the onus as regards the issue of availability of other accommodation. I have already indicated that in my view the onus of proving that other accommodation is available to the tenant is on the landlord (see *Perak Hauliers Ltd v. The Cycle and Carriage Co. Ltd. (ibid)* but the onus of proving that other accommodation is available to the landlord, is on the tenant (see *Sharma v. Sinnama (ibid)*).

However, there is a recent U.K. authority (see *Alexander v. Mohamadzadeh* [1985] 276 EG 1258 for the proposition that where the tenant had not given any evidence of attempts he had made to find alternative accommodation he therefore failed to discharge the burden of proof of greater hardship. The Court of Appeal was, however, unable on the materials available, to come to any definite conclusion whether the landlord reasonably required the premises for his own occupation. The Court reluctantly remitted the matter to the County Court to decide on the issue.

In the present case, upon the record provided, it is clear that the defendant did not lead any evidence to show that he had taken any real steps to try to find other accommodation. It is not at all surprising, therefore, that the learned Magistrate concluded that "the defendant has not proved actual difficulty in finding alternative accommodation" (p. 23E Record of Appeal or p. 4E Grounds of Judgment.)

On the other side of the scales, was the point that the onus was on the plaintiff to prove that other accommodation was available to the defendant and the further fact that the learned Magistrate had not addressed her mind to this matter.

Counsel for the plaintiff sought to salvage the judgment of the learned Magistrate by contending that, upon the evidence, the plaintiff had discharged this onus. The evidence he relied upon to support this submission was, however, very slender being a statement of the plaintiff that - and here I would quote him - "the defendant told me that he had bought another house further away from mine"(p. 9D Record of Appeal). The defendant, on the other hand, asserted that the other house was not his but his brother-in-law's. The Magistrate does not appear to have made any finding as to which of these two versions she preferred although she does refer to the defendant's evidence on this point in describing the narrative of events: (see p. 23B Record of Appeal or p. 4B of the Grounds of Judgment) but that, of course, does not necessarily mean that she accepted it. I think that the best construction I can put on the judgment as regards this part of the case is that the issue as to whether the other house was the defendant's or his brother-in-law's - was left at large as a result of the learned Magistrate having overlooked the point.

It was, however, suggested by Counsel for the plaintiff that since it was the defendant who had alleged that the other house belonged to his brother-in-law, the onus was on him to call the brother-in-law and to produce the relevant title deed. As the defendant had taken neither of these steps, it was urged that the Court should invoke the presumption contained in illustration (g) to s. 114 of the Evidence Act, 1950 (Revised 1974), namely, that the evidence which was being withheld would, if produced, have been unfavourable to the defendant. I regret I find this submission unacceptable since, as I have said, the onus as regards the availability of other accommodation to the tenant was not upon the tenant but upon the landlord. I would add that there should not have been the slightest difficulty in the plaintiff adducing evidence in the form of a certificated abstract of title as to who the registered proprietor of the other house was and yet she studiously refrained from doing so. *Neville v. Hardly (ibid)* shows that the onus upon the landlord in this regard is to satisfy the Court by positive evidence. Clearly, therefore, the plaintiff had failed to discharge this onus.

Another factor which appears to have been overlooked by the learned Magistrate was the financial means of the defendant in relation to the question of the availability of other accommodation to him. This was a factor which could quite properly be taken into account: *Kelley v. Goodwin (ibid)*, *Williamson v. Pallant* [1924] 2 KB 173, *Shrimpton v. Rabits* [1924] 131 LT 478.

In this context it was alleged by the defendant, and not challenged in cross-examination, that although his gross income as a self-employed welder was an average of RM300 p.m. his net earnings were a little over RM200 p.m.

He further testified that he could not afford to find alternative premises, the present rental being too high; to quote him,

> It would cost a few hundred dollars to rent a house - even one room would cost more than RM100. I have also to pay water and electricity bills. I have to pay tea money as well ... I can't afford other premises.

Turning to the Grounds of Judgment, I find that the learned Magistrate did refer to the defendant's claim that he would not be able to afford other accommodation on his meager income as the rentals elsewhere were high (p. 23B App. Record or p. 4B Grounds of Judgment). However, she considered, and I quote her, that

> the mere fact of higher rentals elsewhere than what the defendant is paying now is not in my opinion a sufficient measure of hardship. Apart from that the defendant has not proved actual difficulty in finding alternative accommodation. (p. 23D, E App. Record or p. 4D. E Grounds of Judgment.)

Looking back, I find that there was evidence to support the learned Magistrate's finding that the plaintiff reasonably required the premises for occupation by herself and her children and that the plaintiffs claim in respect thereof was not capricious but *bona fide*.

However, it is as regards the question of "comparative hardship", as to which, the question of "other accommodation" is normally the most important of the circumstances to be considered (*Chandler v. Strevett (ibid))* that I find the grounds of judgment of the learned Magistrate leave much to be desired. In particular, as I have endeavoured to set out in some detail, she appears to have misdirected herself, in the following respects:

(a) she did not address her mind to the question as regards the onus of proof in relation to the issue of availability of other accommodation to the tenant or the landlord;

(b) she failed to recognise that the plaintiff had not discharged the onus of proving that other accommodation was available to the defendant;

(c) in considering the question of comparative hardship, she categorically disregarded the hardship which would be occasioned to the sister or the brother of the defendant by the grant of an order for vacant possession in breach of explicit authority enjoining her to do so;

(d) she failed to take into account or give proper weight to the financial means of the defendant when considering the question of availability of other accommodation to the defendant. Nor did she recognise that on the evidence the plaintiff's financial position appeared to be superior to that of the defendant.

The question which arises for decision is whether notwithstanding the misdirections aforesaid, the judgment of the learned Magistrate should be allowed to stand, having regard to the fact that the tenant gave no evidence as to what steps he had taken to try and get some other accommodation although the burden was on him to demonstrate that there would be greater hardship on him by having to vacate.

In considering the issue of greater hardship the Appellate Court cannot upset the decision of the Trial Court simply because it might have come to a different conclusion itself: See *King v. Taylor* [1955] 1 KB 150 C.A. Clearly, this is the law for the task of weighing the balance of hardship is a matter for the Trial Court. But the point here is that the learned Magistrate misdirected herself on the law in considering the issue of greater hardship and as a result decided it in favour of the plaintiff.

In *Manaton v. Edwards and Anor.* [1985] 276 EG 1257(C.A.), a decision of the Court of Appeal, Lord Parker said:

> It has been said clearly that this Court will only interfere on a question of greater hardship in exceptional circumstances. Nothing that I say in this case, or that my lord has said, should be taken to indicate that this Court will now interfere other than in exceptional circumstances, but when that matter was dealt with in *King v. Taylor (ibid)*, to which reference has been made, Lord Evershed M.R. cited the judgment of Lord Greene in *Coplans v. King* and in that judgment Lord Greene made in clear that **if the county Court in that judgment proceeded on a mistaken basis of law, it would be proper for the Court to interfere**.
> (Emphasis supplied).

In *Chandler v. Strevett (ibid)* para. 2 of the headnote reads: "*Semble* per Scott LJ: *a*

> The County Court Judge's finding of the facts on the evidence is final but his inferences regarding the incidence of hardship is open to review.

In *Piper v. Harvey* [1955] 1 QB 439, Lord Denning said this at p. 446. para. 2:

> It is undoubtedly the law that if it is just a matter of weighing the balance of hardship, that is a matter for the Judge himself who hears the case, and is not a matter in which this Court can interfere. This Court can only interfere if on all the evidence there is **only one reasonable conclusion to be come to, or, alternatively, if the Judge has misdirected himself on the facts or on the evidence**. Here it is a very close thing. But when I look at all the evidence and see the strong case of hardship which the landlord put forward, and when I see that the tenant did not give any evidence of any attempts made by him to find other accommodation, either to look for another house to buy or to rent, it seems to me that there is only one reasonable conclusion to be arrived at, and that is that the tenant did not prove (and the burden is on him to prove) the case of greater hardship. Although it is very rarely that this Court interferes in a hardship case, this does seem to me to be a case where there is only one conclusion possible. I would therefore allow the appeal and give judgment for the landlord for possession. (Emphasis supplied).

b

c

What I therefore propose to do is to proceed by the steps suggested by Scott LJ in *Chandler v. Strevett (ibid)* at p. 165 that is to say, to add up the items of hardship proved in evidence on each side of the "statutory balance sheet" and see on which party the greater hardship falls, and then to put a hardship value on the various items on each side. As the learned Judge observed, this involves making very human estimates of comparative values on which widely divergent views may be taken by any two human minds (at p. 165 at E and F.) *d*

I would regard the following items on each side of the statutory balance sheet as having been clearly proved: *e*

(a) the plaintiff has a house of her own in which she is presently living with her two sons, their wives and children though admittedly under difficult and overcrowded conditions. There is no evidence that the defendant had made any attempts to find other accommodation though he claimed that after receiving the notice to quit his brother had applied unsuccessfully for a low cost flat. To quote the words of Lord Denning in *Piper v. Harvey (ibid)* at p. 445: *f*

> He did not give evidence that he had been around hunting for houses. He did not show that he had made any effort to buy another house or get another house at all.

(b) But, the defendant had sought to raise his relative financial disparity as compared with the plaintiff. He had, as I have said, testified without challenge, that his net income was only RM200 p.m. and so he could not afford to rent a house, for the rental even for a single bedroom would cost more than RM100. He added that renting a room elsewhere would not be adequate for him, his spinster sister and brother to stay. And, so, he could not afford to rent other premises; this part of his evidence was also left unchallenged and, quite frankly, I can find nothing improbable in it. Accordingly, evidence as to means of the defendant went to adulterate the fact that he gave no evidence on his part of actual attempts to find other accommodation. What was the point in seeking other accommodation if he knew that such attempts would be futile? *g* *h*

Looking at the evidence at its full face value, the plaintiff's financial position would appear to be clearly superior to that of the defendant since she owns two houses; the neighbouring premises which she is presently occupying and the premises the subject *i*

of this appeal, whereas, the defendant owns none. Having regard to the defendant's lack of means, would not the effect of an order for possession be, at least, to render his sister homeless? The judgment of the learned Magistrate is silent as regards these matters.

(c) The defendant's desire and need for the premises is obviously genuine and he has raised the position of his invalid spinster sister and brother who have been residing with him all these years, matters which the learned Magistrate wrongly disregarded. But, the plaintiff's desire and need for the premises is equally genuine and she has raised the position of her two sons, their wives and their children who have been residing with her, also all these years, in the neighbouring premises, matters I would regard as relevant not only to the preconditions to a claim based on s. 16(1)(f) of the Act but also under the proviso thereof which relates to the issue of greater hardship.

I shall now proceed to give a hardship value on each side and see on which party the greater hardship falls but before I proceed to do so there is one preliminary observation I must make and that is this:

On the question of availability of other accommodation to the landlord or the tenant, neither party had discharged the onus; that is to say, the plaintiff had not discharged the onus of proving that other accommodation was available to the defendant (see *Perak Hauliers Ltd v. The Cycle & Carriage Co. Ltd (ibid))* nor had the defendant discharged the onus of proving that other accommodation was available to the plaintiff (see *Sharma v. Sinnama (ibid)).* Furthermore, the defendant had not adduced positive evidence of actual unsuccessful attempts made by him to get other accommodation. But, as I have already noted, this omission was adulterated by evidence as to the defendant's lack of means.

Be that as it may, as Lord Sommervilled said in *Chandler v. Strevett (ibid)* at p. 168A -

> ... but under that paragraph (referring to para. (h) of Schedule 1 to the United Kingdom Act of 1933 which is generally in *pari materia* with s. 16(1)(f) of the Act), in having regard to all the circumstances of the case of the Court is expressly enjoined in deciding on the issue of greater hardship, to have regard to the question whether other accommodation is available to the landlord or the tenant. These words and the general principles of the Acts make it clear to my mind that alternative accommodation though not a condition under para. (h) is normally the most important of the circumstances to which regard must be had.

There is undoubtedly evidence of hardship on the side of the plaintiff because of the overcrowded and difficult conditions under which she is staying (though in her own house) with her sons, their wives and children. But there is very strong evidence of hardship on the side of the defendant, consisting of his lack of means to get other accommodation and the hardship to his invalid spinster sister in the event of a possession order being made, since there was a real risk of at least her being rendered homeless. This aspect of the hardship of the defendant and his sister was, as I have already observed, wrongly disregarded by the learned Magistrate. Again, the fact that the plaintiff was much sounder financially than the defendant was a matter upon which the judgment was silent.

I recognise that it is only in exceptional cases that an Appellate Court will interfere on a question of greater hardship: (per Lord Parker) in *Manaton v. Edwards and Anor. (ibid)* at p. 1258 *ante* penultimate paragraph). When, however, as in this case, for the reasons stated, the Trial Court has proceeded on a mistaken basis of the law (per Lord Greene in *Coplans v. King (ibid))* or has misdirected itself on the facts or the evidence (per Lord Denning in *Piper v. Harvey (ibid)* at p. 446) by, for example, omitting some point of substance or by

taking into account something which should not have been considered or by drawing the wrong inferences (per Scott LJ in *Chandler v. Strevett (ibid)* at p. 165G, H) or by making findings which are based upon false premises (per Ong J in *Ponnudurai v. Jayatilake* [1965] 1 MLJ 131), then it would be proper for the Appellate Court to interfere.

In the result, the inevitable conclusion to which I am driven is that this appeal must be allowed and the possession order set aside. The plaintiff will have to pay to the defendant the costs of the proceedings both here and in the Court below. There will also be an order for refund of the deposit paid by the defendant as security for the costs of the Appeal.

Also found at [1988] 1 CLJ 648